

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:08-cr-00107

**FRANK E. MELTON
MICHAEL RECIO
MARCUS WRIGHT**

**GOVERNMENT'S MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF DEFENDANTS' GOOD CONDUCT**

The United States, by its undersigned counsel, respectfully requests that this Court exclude from trial evidence of, or reference to, the defendants' specific instances of good conduct, including evidence of awards, commendations, or recognition they have received as police officers or public officials. Such evidence would constitute improper character evidence under Federal Rules of Evidence 404(a)(1) and 405(a) and therefore should be excluded.

I. Background

On July 9, 2008, a Grand Jury for the Southern District of Mississippi, returned a three-count Indictment against the defendants charging each of them with violating 18 U.S.C. §§ 241, 242, and 924(c) for conduct on August 26, 2006, which led to the unlawful demolition of a private home at 1305 Ridgeway Street in Jackson, Mississippi (hereafter, "the home"). The defendants are charged with conspiring to violate, and with actually violating, the rights of the home's owner and tenant to be free from unreasonable searches and seizures by those acting

under color of law, and with violating a federal firearm statute. Trial in the matter is scheduled for November 12, 2008.

Defendant Frank Melton is the Mayor of Jackson, Mississippi and has held that position since July 2005. Defendants Marcus Wright and Michael Recio have been police officers with the Jackson Police Department for several years and, for approximately the last three years, have worked as full-time bodyguards for defendant Melton. The government anticipates that the defendants may seek at trial to introduce evidence of specific acts of good conduct they engaged in prior to the night of the civil rights violation they are charged with committing. For example, the government anticipates that the defendants may seek to introduce evidence that Recio or Wright received awards or commendations while acting as police officers, or evidence that Melton assisted indigent families in Jackson by personally paying for funerals for deceased family members.

II. Legal Argument

Reference to, or introduction of, evidence of specific instances of good conduct by the defendants should be precluded as impermissible character evidence. Evidence of specific instances of good conduct by the defendants, or of awards, commendations, or other recognition they received, is inadmissible under Federal Rule of Evidence 404(a)(1), because the evidence does not relate to a “pertinent,” or relevant, character trait based on the criminal charges in this case. Second, even if the evidence related to a pertinent trait, evidence of the defendants’ specific acts of good conduct would still be inadmissible because Rule 405(a), which governs the form of character evidence, and allows evidence only as to the reputation of the defendant or as to a witness’s opinion of the defendant’s pertinent character trait; the Rule prohibits the

introduction, by the proponent of the character evidence, of evidence relating to specific instances reflecting the character trait.

A. Evidence of Specific Instances of Good Conduct by the Defendants Constitutes Inadmissible Character Evidence.

Rule 404(a) of the Federal Rules of Evidence generally prohibits evidence of a person's character to prove that the person acted in conformity with the character on a particular occasion. This Rule is "based upon the assumption that such evidence is of slight probative value yet very prejudicial." Reyes v. Missouri Pacific Railroad Company, 589 F.2d 791, 793 (5th Cir. 1979). The Rule's general prohibition against character evidence contains three exceptions, one of which governs the admissibility of character evidence relating to the accused.¹ See Fed.R.Evid. 404(a)(1). The exception concerning the character of the accused specifies that such evidence is admissible only if it relates to a "pertinent," or relevant, character trait. See Fed.R.Evid. 404(a)(1); United States v. Hewitt, 634 F.2d 277, 279 (5th Cir. 1981) (defining "pertinent" as "relevant"). In United States v. Marrero, 904 F.2d 251, 260 (5th Cir. 1990), the Fifth Circuit held that the trial court properly excluded a defendant's good character evidence because evidence that the defendant did not overcharge some customers and provided some services free of charge was not relevant to whether the defendant had overcharged others, as alleged in the indictment charging fraud and theft. See also, United States v. Washington, 106 F.3d 983, 999-1000 (D.C. Cir. 1997) (holding that a police officer's commendations were not admissible because the defendant's "dedication, aggressiveness and assertiveness" in investigating drug dealing and carjacking was neither "pertinent" to, nor an "essential element" of, bribery, conspiracy, or drug and firearms charges with which he was charged); United States v. Nazzaro,

¹ Rule 404(a)(2) contains an exception for character evidence concerning the victim and

889 F.2d 1158, 1168 (1st Cir. 1990)(holding that the trial court properly excluded evidence of a police officer's prior commendations because "the traits which they purport to show -- bravery, attention to duty, perhaps community spirit -- were hardly 'pertinent' to the crimes [of perjury and conspiracy to commit mail fraud] of which [the defendant] stood accused").

In this case, character evidence offered to prove the general good character of the defendants -- such as effectiveness, aggressiveness, attention to duty, commitment to public service, kindness, generosity, or dedication -- is not admissible because it is not pertinent to the civil rights, conspiracy, and firearms charges brought against the defendants. Although a defendant's character for law-abidingness is always "pertinent," see United States v. Hewitt, 634 F.2d 277, 279 (5th Cir. 1981), evidence of the defendants' good acts to help citizens of Jackson does not constitute evidence of their law-abiding character and does not conform to the proper form of character evidence, as discussed in Section B below. Thus, evidence of the defendants' specific good acts, commendations, and awards is irrelevant and should be excluded as impermissible character evidence.

B. Any Admissible Character Evidence Must be Limited in Form to Testimony as to the Witness's Opinion of the Defendant or the Defendant's Reputation.

Even if evidence of the defendants' prior good acts were indicative of a pertinent character trait or indicative of general law-abidingness, the form of that evidence would be governed by Federal Rule of Evidence 405(a), which limits such evidence to "testimony as to reputation or by testimony in the form of an opinion." Fed.R.Evid. 405(a). Proof of specific instances of conduct is not permitted under the Rule. See United States v. John, 309 F.3d 298, 303 (5th Cir. 2002); United States v. Marrero, 904 F.2d at 260 (finding that trial court properly

Rule 404(a)(3) contains an exception for character evidence concerning a witness.

excluded defendant's proffer of specific instances of good character).² See also, United States v. Ellisor, 522 F.3d 1255, 1270-71 (11th Cir. 2008); United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978)(finding that trial court should not have permitted defense witness to establish defendant's good character by referring to specific good acts).

Thus, even if the defendants established a basis for evidence of good character being relevant, the defendants would still be limited to proving such good character through testimony as to the defendants' reputation or testimony in the form of an opinion about the defendants' relevant character trait. For example, a witness could testify that he is familiar with the defendant's reputation and that the defendant has a reputation for being a law-abiding citizen. Defendants would not be permitted, however, to introduce evidence of, or refer to, any specific instances of good conduct engaged in by the defendants, or to introduce evidence of, or refer to, their good work performance or achievements in general. Even in the limited circumstances in which character evidence concerning the defendants is admissible, circumstantial evidence that the defendants acted in conformity with a relevant character trait may not be proved by specific instances of good conduct.³

² Rule 405(b) permits specific instances of conduct to prove character only in cases in which the character trait at issue is "an essential element of a charge, claim, or defense." For example, in a defamation or libel case, damage to the reputation of the complainant is an essential element of the charge. See Schafer v. Time, Inc., 142 F.3d 1361, 1371-72 (11th Cir. 1998). In this case, the defendants' character is not an essential element of any charge or defense.

³ If the defendants' witnesses are permitted to offer character evidence in the form of reputation and opinion testimony regarding the good character of the defendants, the government is permitted under Rule 405(a) to inquire of the witnesses on cross-examination about their knowledge of specific acts of misconduct by the defendants. See United States v. Edwards, 549 F.2d 362, 367 (5th Cir. 1977).

The Supreme Court, in Michelson v. United States, 335 U.S. 469, 479 (1948)(footnotes

WHEREFORE, the United States respectfully requests that this Court exclude character evidence offered by the defendants such as evidence of specific instances of good conduct, awards, commendations or other recognition received by the defendants.

Respectfully submitted,

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omitted), stated:

The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him . . . Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans.

Inquiries regarding prior misconduct are subject to the limits that (1) the prosecutor "must have some good faith factual basis for the incidents inquired about," and (2) the incidents must be relevant to the character traits involved at trial. Wells, 522 F.2d 974, 976 (5th Cir. 1976)(citations omitted).

(202) 514-3204

CERTIFICATE OF SERVICE

I, the undersigned counsel for the United States, hereby certify that on the 29th day of September, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

John Reeves, Attorney for Frank E. Melton

John M. Colette and Matt Baldrige, Attorneys for Defendant Marcus Wright; and

Cynthia Stewart, Attorney for Michael Recio.

/s/ Mark Blumberg